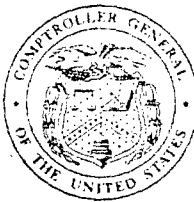


DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

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PLM II

FILE: E-195714 *PO*

DATE: January 29, 1980

MATTER OF:

*check GPO manual
for abbreviations*
Petty Officer First Class/Arthur G.
Stanley, USN (Retired)**DIGEST:**

Service member's [request for waiver of his debt] to the United States arising out of erroneous payments of a military basic allowance for quarters must be denied, where it appeared that he knew or suspected he was being overpaid. Under the governing provisions of statutory law, waiver is not allowed if the member knew or should have known he was being overpaid at the time, and consequently, in this case, the collection of the overpayment is neither against equity nor good conscience. 10 U.S.C. 2774 (1976).

Petty Officer First Class Arthur G. Stanley, USN (Retired), 342-28-5832, requests reconsideration of our Claims Division's denial of his request for waiver of the Government's claim against him resulting from erroneous payments of a military basic allowance for quarters he received during the period from July 1, 1975, through February 29, 1976. In view of the facts presented, and the applicable provisions of law and regulation, we sustain the Claims Division action. *AGC 0000*

Under the pay and allowance system applicable to members of the uniformed services either Government living quarters are provided or a basic allowance for quarters is paid. A service member who is provided with suitable Government quarters "is not entitled to a basic allowance for quarters." 37 U.S.C. 403(b) (1976). In addition, an enlisted member is entitled to a basic allowance for subsistence when Government rations are not made available to him or he is granted permission to mess separately. 37 U.S.C. 402(b) (1976).

In July 1975 Petty Officer Stanley was entitled to a basic allowance for subsistence, but he was not entitled to the basic allowance for quarters since he and his family were occupying Government quarters at the time. Through administrative error the Navy pay

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record that was opened for him for the 6-month period beginning July 1, 1975, showed the reverse: that he was not entitled to a basic allowance for subsistence, but that he was entitled to the basic allowance for quarters. As a result, in July 1975 Petty Officer Stanley's net pay was suddenly and unexpectedly increased by approximately \$85. He promptly went to his local disbursing office to inquire about the reason for the sudden increase in his pay, but he was apparently told that it was probably due to a decrease in tax withholdings and "not to worry about it."

In November 1975 the errors in Petty Officer Stanley's pay record were partially corrected to show that he was entitled to a basic allowance for subsistence, and he received payment for that allowance retroactive to July 1, 1975. However, the erroneous entry showing that he was entitled to a basic allowance for quarters was not also corrected then. That error was carried over onto the 6-month pay record opened for him on January 1, 1976. Eventually in February 1976 that error was discovered by Navy finance authorities, and it was then determined that Petty Officer Stanley had received erroneous quarters allowance payments in a total amount of \$1,306.20 between July 1975 and February 1976.

Petty Officer Stanley subsequently requested that his resulting indebtedness to the Government in that amount be waived. However, as previously indicated, our Claims Division denied his request. Essentially, it was concluded that a service member of Petty Officer Stanley's rank and years of experience should have realized he was being mistakenly overpaid and should have retained the excessive payments for eventual return to the Government, so that it would not be against equity and good conscience to require him to pay his debt.

Petty Officer Stanley has questioned the correctness of that conclusion. In substance, he indicates that while he suspected he was being overpaid, the disbursing clerk with whom he spoke assured him that his increased

pay was due to a tax cut or rebate, "so I let it go at that." He suggests that since the mistakes made were due to the fault of disbursing personnel, he should be entitled to have a waiver of his debt that resulted from those mistakes. In that connection, he states that the people who made the mistakes had as much or more time in service as he did, and they were supposed to be the pay experts. He therefore questions whether it is fair for him to be held responsible for their errors.

Subsection 2774(a) of title 10, United States Code (1976), provides in pertinent part that a claim against a member or former member of the uniformed services arising out of an erroneous payment of pay or allowances, the collection of which "would be against equity and good conscience and not in the best interest of the United States, "may be waived in whole or in part. Subsection 2774(b) further provides that the Comptroller General or the Secretary concerned, as the case may be, may not exercise his authority to waive any claim:

"(1) if, in his opinion, there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member or any other person having an interest in obtaining a waiver of the claim * * *"

"Fault," as used in this subsection is considered to exist if it is determined that the member should have known that an error existed but failed to take action to have it corrected. 4 C.F.R. 91.5 (1978).

There does not appear to have been any fraud or misrepresentation on the member's part in this case, the erroneous payments having been made as a result of administrative error. It does appear that the member knew or suspected that erroneous payments were being made, and he took action to notify the appropriate officials when he asked a clerk at his local disbursing office to check his pay.

However, the waiver statute does not apply automatically to relieve the debts of all members who, through no fault of their own, have received erroneous payments from the Government. It must be noted, to the contrary, that waiver action under 10 U.S.C. 2774 is a matter of grace or dispensation, and not a matter of right that arises solely by virtue of an erroneous payment being made by the Government. If it were merely a matter of right, then virtually all erroneous payments made by the Government to service members would be excused from repayment.

The foregoing directly ties in with the precept that persons receiving money erroneously paid by a Government agency or official acquire no right to the money. The courts have consistently held that such persons are bound in equity and good conscience to make restitution. In other words, if a benefit is bestowed through mistake, no matter how careless the act of the bestower may have been, the recipient of the benefit must make restitution, the theory being that restitution results in no loss to the recipient. He merely received something for nothing. See for example United States v. Northwestern Nat. Bank & Trust, 35 F. Supp. 484 (1940). Also compare Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380 (1947); and Posey v. United States, 449 F. 2d 228 (1971).

The waiver statute was enacted to provide authority to relieve debtors from their obligations under certain circumstances including, as stated above, when requiring repayment would be against equity and good conscience and not in the best interest of the United States. In this case it is clear that the member knew or suspected from the outset that he was being overpaid amounts greatly exceeding his entitlement, amounts he would eventually be required to refund. While the actions he took to bring the errors to the attention of appropriate officials are commendable, they are also the actions expected of a reasonably prudent person. In addition, in view of the substantial amounts of the overpayments, a person of Petty Officer Stanley's rank and years of experience should have been aware of the strong

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possibility that the clerk with whom he spoke at his local disbursing office was in error in advising him that the large increase in his pay was due to a tax cut or rebate. Thus, in the circumstances, it is our view that requiring the member to pay his debt is neither against equity and good conscience nor contrary to the best interest of the United States. B-193367, January 10, 1979.

Accordingly, the action taken by our Claims Division in denying waiver in this case is sustained.

- *Milton J. Fowler*
For the Comptroller General
of the United States